

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ALYSON HERFERT, TALANA WILEY, )  
SHANNON GORDNER, KATHRYN DE )  
PEUTER, BECKY KUHL, ALANNA )  
WASKO, and DENIZ ZOELLER, on behalf of )  
themselves and all others similarly situated, )  
Plaintiffs, )  
v. )  
CRAYOLA LLC, )  
Defendant. )

No. 2:11-cv-1301-JCC

REPLY BRIEF IN SUPPORT OF FINAL  
APPROVAL OF SETTLEMENT AND  
RESPONSE TO OBJECTION

The Parties negotiated excellent relief for the class and the settlement should be approved.<sup>1</sup> The strength of the settlement is shown, in part, by the weakness of opposition to it: only a single objection was filed and there were no opt-outs, although millions of 2011 Washable Colored Bubbles were distributed. The “positive response to the Settlement by the Class—evidenced by a very small percentage of opt-outs and objections—further supports final approval.” *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 543 (W.D. Wash. 2009).

<sup>1</sup> Capitalized terms in this brief are defined in the Settlement Agreement (Dkt. 27-1 at 3-6, “Settlement Agreement”). To the extent, if any, that any of the settlement terms described in this brief conflict with the terms of the Settlement Agreement, the Parties intend the Settlement Agreement to prevail.

As explained more fully in the Parties' submissions in support of preliminary and final settlement approval (Dkt. 27 and Dkt. 44, *see also* Dkt. 41, Memo. in Supp. of Attorneys Fees), the terms of the Settlement Agreement were carefully crafted in the mediation process. Mediation was overseen by a former federal judge and mediator, the Honorable Layn Phillips, and the settlement protects the interests of Class Members. Decl. of the Honorable Layn R. Phillips in Supp. of Joint Mot. for Conditional Certification of Settlement Class, Preliminary Approval of Settlement, Approval of Notice Plan & Notice Administrator and Appointment of Lead Counsel at ¶¶ 9-11 (Dkt. 29) (acknowledging vigorous arm's length and good faith negotiations). For example, while Crayola is the Settlement Administrator, the total compensation provided under the Settlement Agreement has no ceiling, and Crayola must provide confirmatory discovery to Plaintiffs on a quarterly basis to ensure the process is proceeding smoothly. Settlement Agreement at 11-16. In addition, Class Members, or the Parties, can seek the involvement of a third party, GCG, Inc., to resolve any disputes that arise throughout the claims process. Settlement Agreement at 13.

Amber Pederson makes several objections, all of which misperceive the terms of the Settlement Agreement. Objection of Settlement filed by Claimant Amber Pederson (Dkt. 47, "Pederson Objection").<sup>2</sup> Specifically, Pederson makes nine objections, each of which is contradicted by the terms of the Settlement Agreement, as shown in the table below.

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<sup>2</sup> The parties have searched their respective files and found no record that Pederson had contacted either Crayola or Lead Class Counsel about the 2011 Washable Colored Bubbles.

Objections to Settlement Agreement	Settlement Agreement Relief Provided
Injunctive relief is illusory. Pederson Objection at 1.	<p>The Settlement Agreement requires Crayola, by this Court's order, to take several specific actions, including:</p> <ul style="list-style-type: none"> <li>• Discontinue the production of 2011 Washable Colored Bubbles, as originally formulated and labeled.</li> <li>• Re-label the packaging for the 2012 Colored Bubbles so that it: <ul style="list-style-type: none"> <li>• Does not state "Washable";</li> <li>• Does not state "Spill Resistant";</li> <li>• Increases prominence of direction for "Outdoor Use Only" and cautions against indoor use;</li> <li>• Increases visibility of additional guidance on product insert "Read before you play";</li> <li>• Recommends use of "play clothes" on front of packaging and labels; and</li> <li>• Advises that the product provides "messy" fun.</li> </ul> </li> </ul> <p>Settlement Agreement at 14.</p>
"There is no guaranteed minimum payout [for property damage or cleaning costs]." Pederson Objection at 1.	The Claims Program shall run through December 31, 2012, and Crayola will be bound by the terms set forth in the Settlement Agreement <i>no matter how many claims are made</i> for property damage or cleaning costs. Settlement Agreement at 11-13.
"There are no clear rules that will be followed [in the Claims Program]." Pederson Objection at 1.	Rules for monetary and voucher relief are detailed at length in the Settlement Agreement according to proof of purchase and category of damage. Settlement Agreement at 11-13.
"Crayola itself has too much power in the claims process." Pederson Objection at 1.	Accountability is built into the Settlement Agreement. For instance, the Settlement Agreement assures that any Class Member who is dissatisfied with Crayola's response will have access to an experienced, neutral third party mediator, at no cost. Settlement Agreement at 13. Moreover, Crayola maintains that it has a vested interest in maintaining the best customer relations with Class Members because its customers tend to purchase multiple Crayola products. Thus, Crayola is highly incentivized to process all claims professionally and to the mutual satisfaction of the Parties.

Objections to Settlement Agreement	Settlement Agreement Relief Provided
“(T)he Court should wait until all claims data is (sic) in before assessing any value.” Pederson Objection at 2.	It makes no sense to require implementation and execution of a claims process before assessing its sufficiency. Moreover, because total compensation has no ceiling, and product marketing and formulation are improved under the Settlement Agreement, there is no need to wait until all claims are received and paid. Settlement Agreement at 11-15.
Class Members could have gotten compensation from Crayola without the settlement. Pederson Objection. at 2.	The settlement provides accountability, including clear rules for awarding compensation, as well as making a third party available to settle disputes. Further, it requires Crayola to report this relief to Plaintiffs’ counsel through confirmatory discovery. Settlement Agreement at 11-16.
The settlement provides no “guaranteed relief.” Pederson Objection at 2.	On the contrary, the “guaranteed relief” provided in the Settlement Agreement requires Crayola to compensate Class Members, and grants Class Members access to a third party mediator if they are dissatisfied with Crayola’s response. Settlement Agreement at 11-16.
The relief is too modest. Pederson Objection at 2.	<p>With a proof of purchase or UPC, Class Members are eligible to receive the cash value plus any shipping, handling, and tax paid in connection with their purchase. They are also eligible for a voucher that is stackable and transferable plus \$5. Settlement Agreement at 11-12.</p> <p>Without proof of purchase, Class Members may still claim Crayola vouchers up to \$12, a generous amount considering the modest price of the product and the lack of evidence of financial outlay. Settlement Agreement at 11.</p> <p>Cleaning product costs incurred due to the 2011 Washable Colored Bubbles, for which the Class Member has a receipt or other reliable documentation, are also eligible for reimbursement. Settlement Agreement at 12.</p> <p>The Settlement Agreement also provides for out-of-pocket costs to remediate damage to real or personal property. Settlement Agreement at 12.</p>
“Attorneys’ fees are excessive under either a loadstar or percentage of recovery analysis.” Pederson Objection at 2.	Plaintiffs maintain that the attorneys’ fees are appropriate and represent counsel’s loadstar. <i>See</i> Pls. Memo. in Supp. of an Award of Attorneys’ Fees, Reimbursement of Expenses, and Representative Pl. Award Payments (Dkt. 41).

1 Plaintiffs also maintain that the attorney fee award here is reasonable and it is supported  
2 by the relief achieved as well as Ninth Circuit precedent. (Dkt. 41 (Plaintiffs' Fee Motion).)  
3 Objector Pederson states, without further elaboration, that the attorney "fees are excessive under  
4 either a lodestar or percentage of recovery method." (Dkt. 47 at 2.) Rather than repeat the  
5 arguments made at length in Plaintiffs' brief in support of the attorney fee award, Plaintiffs  
6 simply stress two points: first, the fees are Plaintiffs' counsel's presumptively reasonable  
7 lodestar—indeed, the modest multiplier of 1.03 (Dkt. 41 at 5) noted in the fee petition has  
8 vanished as counsel work toward final approval. Second, the settlement is an extraordinary result  
9 for the class, achieved quickly and efficiently. Within months of filing, consumers are being  
10 offered money back, compensation for damage to property, and Crayola is rolling out an  
11 improved product with more accurate labeling and advertising. Such a result amply supports  
12 granting counsel's request for their lodestar.

DATED this 13th day of April, 2012.

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**CERTIFICATE OF SERVICE**

I certify that on this 13th day of April, 2012, I electronically filed the foregoing documents with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties or their counsel. There are no non-CM/ECF participants.

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